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In the

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1385

DIXSIE KIRKLAND, Administratrix of the Estate of LEROY KIRKLAND, deceased,
Petitioner,

VERSUS

MISSOURI-KANSAS-TEXAS RAILROAD COMPANY, a Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In response to the Petition for Writ of Certiorari of the petitioner, Dixsie Kirkland, the respondent, Missouri-Kansas-Texas Railroad Company, respectfully submits:

STATEMENT OF THE CASE

The following facts appear in the record and are respectfully submitted in addition to the petitioner's statement of the case:

The train and flat car involved in this accident had been completely stopped upon the crossing for a minimum of twenty (20) to forty (40) seconds prior to the collision (Dep. of John D. Blancett, pp. 26, 35).

The railroad crossing located approximately one hundred fifty (150) feet east of respondent's tracks (petitioner's decedent's vehicle approached from the east) was owned by a railroad other than respondent and was marked by a railroad crossing sign (Dep. of Arthur B. Peterson, p. 35; Dep. of Eddie Becerra, p. 41).

The flat car which petitioner's vehicle struck was a "bulkhead" flat car. That car was constructed with ends on it and under the bed of the car was a solid structure extending down approximately two and one-half (2½) feet (Dep. of John D. Blancett, pp. 51, 52, and Dep. of D. S. Chance, Jr., p. 19).

The record contains no evidence, contrary to petitioner's assertion, that the switch was "defective." The record does indicate that it was difficult to operate.

RESPONSE TO REASONS FOR GRANTING THE WRIT

(pages 8 and 9 of Petitioner's brief)

The United States District Court for the Western District of Oklahoma correctly sustained respondent's Motion for Summary Judgment following the decisions of the Supreme Court of Oklahoma. The action of the District Court was correctly affirmed by the Tenth Circuit Court of Appeals.

The common-law action in tort arising from an auto-train accident, in Oklahoma, failed to show any evidence of primary negligence on the part of respondent. Each of the facts and allegations made by petitioner has been rejected

under the decisions of the Oklahoma Supreme Court as sufficient evidence of primary negligence in such cases to submit the issue of negligence to a jury, as a matter of state law.

The action was removed from the state court to the Federal court on diversity of citizenship. Oklahoma law is applicable. A review of this case would be of no importance to any jurisdiction on these facts, except to the State of Oklahoma. Decisions of the Oklahoma Supreme Court conclusively establish, under the facts present in this case, that the evidence does not establish any evidence of primary negligence on the part of the respondent.

It is not questioned by respondent that issues of negligence are not usually susceptible to determination by summary judgment. However, to hold the summary judgment improper would constitute a complete disregard of Oklahoma law. If summary judgment was not allowed in this case it would, in effect, not be proper in any negligence action, regardless of the facts. Sustaining a motion for summary judgment is not a denial of a right to jury trial nor a departure from the usual course of judicial proceedings, when, under applicable state law, one party is entitled to judgment as a matter of law. Otherwise, summary judgment would be improper in any case where a plaintiff was entitled to a jury trial on the issues, regardless of the evidence presented, and the issues of law applicable.

The substantive law of Oklahoma is applicable. The evidence has been reviewed by two courts (United States District Court for the Western District of Oklahoma and the Tenth Circuit Court of Appeals). Both courts, follow-

ing Oklahoma law, found there was no evidence of primary negligence on the part of the respondent. Respondent, under Oklahoma law, was entitled to a judgment as a matter of law.

All other issues raised by petitioner, other than whether respondent was entitled to a judgment as a matter of law, have been raised for the first time in this appeal.

RESPONSE TO PETITIONER'S HEADING "QUESTIONS PRESENTED FOR REVIEW"

(pages 3-5 of Petitioner's brief)

ARGUMENT AND AUTHORITIES

Respondent will hereinafter discuss each question presented by petitioner for review. In this regard questions which involve the same legal principles will be combined for the sake of brevity.

A. Response to Petitioner's Question No. 1 (Petitioner's brief, p. 3): "Whether the plaintiff's amended petition if taken as true states a cause of action against the defendant for the injuries and subsequent death of plaintiff's decedent."

The action in the trial court would be controlled by the decisions of the Oklahoma Supreme Court, applying Oklahoma law in such cases. The propriety of summary judgment depends upon whether or not any factual issue remains to be tried. The pleadings are to be liberally construed in favor of the party opposing the motion. However, the formal allegations of the pleadings are pierced on a motion for summary judgment. Pleadings do not stand as

dispositive of the question, *i.e.*, is the moving party entitled to judgment as a matter of law. Federal Rules of Civil Procedure 56(b)(c) 28 United States Code Annotated (1963); *Fitzgerald* v. *Westland Marine Corp.*, 369 F.2d 499 (C.A. N.Y. 1966); *Bushman Const. Co.* v. *Air Force Academy Housing, Inc.*, 327 F.2d 481 (C.A. Colo. 1964).

Nevertheless, under the allegations of the complaint, the facts, if taken as true, would not be sufficient to overcome a demurrer to an identical petition in the Oklahoma State courts. *Raley* v. *Thompson*, 225 P.2d 171 (Okla. S.Ct. 1950). In this regard the allegations of the complaint and evidence before the trial court as related to the propriety of summary judgment in this action will be developed further in response to the second question posed by petitioner, since the same legal issues are involved therein.

B. Response to Petitioner's Question No. 2 (Petitioner's brief, p. 3): "Whether any material issue or issues of fact dispositive of right or duty exist in the cause after examination of the facts discovered by depositions and interrogatories."

The issue of law applicable in this case involves the sufficiency of evidence under Oklahoma law, to create a jury issue of negligence where an automobile collides with a train which has occupied a railroad crossing prior to the collision. The Supreme Court of Oklahoma has considered this question in at least nine separate decisions. The decisions are: *Oklahoma City-Ada-Atoka Railway* v. *Nickels*, 343 P.2d 1094 (Okla. 1959); *Kansas, Oklahoma & Gulf Railway Co.* v. *Painter*, 333 P.2d 547 (Okla. 1958); *Cain* v. *St. Louis-San Francisco Railroad Co.*, 293 P.2d 355 (Okla. 1956); *Atchison, Topeka and S. F. Ry. Co.* v. *Templar*, 230 P.2d 907

(Okla. 1951); *Raley* v. *Thompson*, 225 P.2d 171 (Okla. 1950); *Fleming* v. *Loch*, 195 P.2d 942 (Okla. 1948); *Thompson* v. *Carter*, 137 P.2d 956 (Okla. 1943); *Lowden* v. *Bowles*, 105 P.2d 1061 (Okla. 1940); and *Kurn* v. *Jones*, 101 P.2d 242 (Okla. 1940). The rule was recognized and followed by the Tenth Circuit Court of Appeals in *Holt* v. *Thompson*, 115 F.2d 1013 (10th C.C.A. 1940).

The general rule applicable in cases of this nature is expressed in *Oklahoma City-Ada-Atoka Ry. Co.* v. *Nickels*, *supra*, in Syllabus 2 by the Court as:

> "Ordinarily, the presence of a train or railway cars on a crossing, whether moving or stationary, is sufficient notice to a driver of a vehicle on the highway of such obstruction and, in the absence of unusual circumstances, the operating railway company is not under any duty to provide any other notice or warning."

The evidence in this case is not, under Oklahoma law, sufficient to create a jury issue of negligence on the part of respondent. In its opinion, the Tenth Circuit Court of Appeals (Appendix "B" to Petitioner's brief) views the facts most favorable to petitioner. The issues were examined in light of Oklahoma case law (above cited) and in the court's opinion affirming the Motion for Summary Judgment the Circuit Court held:

> "Under the law of many states the cited facts would assuredly prevent the granting of a summary judgment but the law of Oklahoma is clearly otherwise. Each of the factual circumstances upon which plaintiff relies has been specifically negatived as sufficient to impose liability on the railroad. * * * "

The Circuit Court, in its opinion, following Oklahoma case law, recognized that none of the circumstances surrounding the accident in question were, as a matter of law, "unusual circumstances" within the meaning of the rule. The train itself was sufficient notice and warning. No additional warning on the part of the railway company was required.

In *Kurn* v. *Jones, supra,* plaintiff drove his vehicle into a flat car, coupled between two box cars. The flat car was stopped over the crossing. Defendant gave no warning of the presence of the car. Plaintiff did not see the flat car until he was six or seven feet from it. Negligence complained of by plaintiff included failure to provide a signal or flagman; negligently allowing a flat car to stand on a highway with a box car on either side when the tracks were on an incline, which would lead a motorist to believe the box cars were cut, leaving a passageway for traffic. The Oklahoma Supreme Court held there was no evidence of negligence on the part of the railroad company. The facts in *Kurn, supra,* are substantially the same as in this case.

In considering *Kurn, supra,* and the rule announced and followed in Oklahoma, it is noted petitioner says the case of *Chicago, Rock Island & Pac. R. R. Co., a corporation, et al.* v. *Melot,* No. 42662, Vol. 42, p. 423 of the Oklahoma Bar Journal (1971) is factually similar. In this regard petitioner says in her brief that the case is not the law in Oklahoma. Not only is the case not the law in Oklahoma, but by statute, no opinion of the Court of Appeals is binding, or shall be cited as precedent unless approved by a majority of Justices of the Oklahoma Supreme Court, for publication in the official reporter. Title 20 O.S. § 30.5 (1970).

The *Melot* decision was not so published. It is not an announcement of Oklahoma law.

Nevertheless, we would ask that this Court examine the opinion in *Kurn* in relation to the opinion of the Oklahoma Court of Appeals as quoted in petitioner's brief at page 26. The principle as found in *Kurn*, *supra*, pages 243, 244, without any omissions, is as follows:

> "The burden in such case is upon plaintiff to establish a set of circumstances that would warrant the jury's consideration of the question of reasonable care on the part of the trainmen. If the court is of the opinion that reasonable men might differ as to whether the trainmen in the exercise of reasonable care might have anticipated the accident, then the jury should be allowed to decide the questions of primary negligence and of proximate cause.
>
> "*The above rule applies only in those jurisdictions where statutes regulate neither the railroad nor the motorist in such cases. In the instant case the defendant was within its legal rights in blocking the highway with the freight car.* The presence of the train standing on the track did not constitute negligence. The Guthrie case, above, recognizes that rule. We have no statute defining the duties of the railroad company in cases of this character. But a party in the exercise of a legal right may be held liable for injuries resulting therefrom to others if in the performance thereof he might have reasonably foreseen or anticipated the injury and failed to exercise reasonable care in warning the injured party of the existing dangers. If on the evidence reasonable men might differ as to the degree of care required under the circumstances, the jury must say whether the defendant was negligent in this respect. Martin v. McLain, 184 Okl. 418, 87 P.2d 1075.

> "But we have a statute governing a motorist's duties while driving on a highway. Sec. 14, ch. 113, S.L. 1933, 47 Okl. St.Ann. § 92. *It should be considered and applied to the question of primary negligence in cases of this character*, not merely as an element of contributory negligence in its violation by the motorist but as a *circumstance in the state of facts from which to determine the question of the degree of care and caution demanded of the trainmen with reference to warning the traveling public of the presence of the freight cars.* * * *" (Emphasis supplied.)

The Court went on to say the law makes no distinction between flat cars and box cars. Plaintiff had no legal right to assume the road was clear. The railroad had a legal right to block the highway.

There is no duty under Oklahoma law, *Kurn, supra,* for the railroad to anticipate a car being operated after dark, properly equipped with lights and operating at a reasonable speed would collide with a train legally occupying the crossing. Both the District Court and the Tenth Circuit Court of Appeals recognize the rule in Oklahoma, and properly applied it in this case.

Petitioner contends *Missouri-Kansas-Texas R. Co.* v. *Castor*, 410 P.2d 67 (Okla. 1965), has modified the case of *Raley* v. *Thompson, supra.* The *Castor* case did not involve nor discuss the rule of law applied in cases where the train has occupied the crossing.

In her brief, petitioner cites the companion cases of *Missouri-Kansas-Texas R. Co.* v. *Hayes*, 445 P.2d 249 and 445 P.2d 254 (Okla. 1960). The rule of law announced therein is quoted at page 23 of petitioner's brief. These

cases were decided after *Castor, supra,* and recognize the same rule applied by the Tenth Circuit Court of Appeals in this case. The *Hayes* case, *supra,* recognized an exception to the rule that the train is not notice. The Court noted that the rule may not apply when the train and car arrive at the crossing almost simultaneously. Clearly, *Castor, supra,* has not changed the law in Oklahoma in such cases. It is undisputed in this case that the train had been stopped upon the crossing a minimum of twenty to forty seconds prior to the collision. There was no simultaneous arrival. The train was sufficient notice as a matter of law.

The case of *Smoot* v. *Chicago, R. I. & P. Ry. Co.,* 378 F.2d 879 (10 C.C.A.) dealt with facts similar to the *Hayes* cases, *supra.* In its opinion the Tenth Circuit noted the rule in *Smoot, supra,* was clearly distinguishable.

Petitioner, at page 24 of her brief, says that it is significant in the *Hayes* case, *supra,* that the same defense here asserted was rejected by the Oklahoma Supreme Court. Factually, the cases are obviously distinguishable as there was no simultaneous or near simultaneous entry of the train and automobile onto the crossing. Petitioner goes on to say that the Court, in *Hayes, supra,* rejected the argument, citing *Atchison, Topeka and S. F. Ry. Co.* v. *Templar, supra.* In this regard, petitioner says that *Templar, supra,* held that the fact the train was already upon the crossing when the automobile hit it did not relieve the defendant railroad from its duty to warn the automobile driver of the approaching train. An examination of the opinion of the Oklahoma Supreme Court in *Hayes, supra,* would indicate that petitioner's contention is unfounded. Further, *Templar, supra,* involved an automobile-train ac-

cident which occurred after dark, where the automobile struck the fifteenth or sixteenth car of the train. The night was cloudy and dark at the time of the accident. There were background lights and an advertising sign which plaintiff claimed created a deceptive condition. Further, there was a wig-wag protection device which was concealed from the driver's view by box cars located upon the crossing. Plaintiff further contended that the deceased was ignorant of the crossing and therefore the train was not noticed. The Oklahoma Supreme Court held that if ignorance of the existence of the crossing created an exception to the rule, that the train itself was notice, the railway company would at all times and under all conditions be required to guard against drivers approaching on the highway. Contrary to petitioner's assertion on page 24 of her brief that *Templar, supra,* held the fact that the train was already on the crossing did not relieve the railroad from its duty to warn, the Oklahoma Supreme Court after reviewing all of the evidence reversed a jury verdict for the plaintiff, with directions to render judgment for the defendant railroad. After reviewing the "occupied crossing" cases in Oklahoma the Court said at page 911 of its opinion in *Templar:*

> "a careful study of the record and authorities convinces us that the rule contended for by defendant applies and that negligence on the part of the defendant was not the proximate cause of the death of deceased."

Petitioner's construction and assertion as to the holding in *Templar* is unfounded.

Petitioner contends in her brief that the crossing sign was improper and in violation of 66 O.S. § 124 (1963), and that this alone was sufficient to constitute sufficient evi-

dence of negligence to submit this case to the jury. In this regard, petitioner cites *Buck* v. *Missouri-Pac. R. Co.*, 252 F.Supp. 704 (U.S.D.C. W.D. Okla. 1966). Certainly the violation of a statute under Oklahoma law may constitute evidence of negligence. However, *Buck, supra,* does not reflect in the opinion that the crossing was occupied within a sufficient time prior to impact so that the presence of the train itself was sufficient notice. That case did not discuss, nor did it deal with the rule of law announced by the Oklahoma Supreme Court in cases where the train had occupied the crossing prior to impact.

In this regard we would respectfully direct this Court's attention to the case of *Fleming* v. *Loch, supra. Fleming* involved an occupied crossing. The factual situation applying the rule of law which this respondent contends applies in this case. The Oklahoma Supreme Court in *Fleming, supra,* rejected the lack of a statutory warning sign at a railroad crossing as evidence of primary negligence in such cases. This lack of a sign was rejected as a matter of law. The Oklahoma Supreme Court said, at page 943 of its opinion:

> "The construction of the sign as required by statute or by ordinance would have added nothing to the information imparted by the presence of the train. The proximate cause of the collision was plaintiff's inability to stop his car within the assured clear distance ahead as hereinafter discussed."

Thus, *Fleming, supra,* recognizes that the issue in such cases is not whether the signs such as required by statute are available, but rather whether the train itself is sufficient notice to the public that the crossing is obstructed.

The case before this Court was a diversity action, removed to the United States District Court for the Western District of Oklahoma. Oklahoma substantive law applies. The rule announced by the Oklahoma Supreme Court in *Fleming, supra,* is applicable to the facts in this case and was properly applied by the Court.

It is further well established by decisions of the Oklahoma Supreme Court that where a vehicle collides with the side of a train which has occupied a crossing the lack of additional warnings in the nature of railway flashing lights, gates, or other visible signs at the track is not evidence of primary negligence. *Raley* v. *Thompson, supra.*

Dunn v. *St. Louis-San Francisco Ry. Co.,* 370 F.2d 681 (10 C.C.A. 1967), is cited by petitioner as support for the authority that the lack of a crossing sign or lack of a proper crossing sign was evidence of primary negligence. *Dunn, supra,* involved a malfunctioning wig-wag sign at the crossing which plaintiff allegedly relied upon. The train had not entered the crossing prior to collision. The rule applied by the Oklahoma Supreme Court in cases where the train had occupied a crossing prior to impact is applicable to the facts in the case before this Court.

In *Atchison, Topeka and S. F. Ry. Co.* v. *Templar, supra,* the Oklahoma Supreme Court said, at page 911 of its opinion:

> "Plaintiff, in insisting that the signs maintained at the crossing by the railway were insufficient calls attention to Kurn v. Campbell, 188 Okl. 636, 112 P.2d 386; Kurn v. Manley, 194 Okl. 574, 153 P.2d 623, and other similar cases. But in none of those cases, except Chicago, R. I. & P. Ry. Co. v. Richerson, 185 Okl. 560,

> 94 P.2d 934, was the crossing obstructed by a train at the time the collision occurred, and in that case the evidence was conflicting as to whether the train occupied the crossing at the time the plaintiff struck it, or whether it arrived at the crossing such a short time before plaintiff arrived that plaintiff was unable to stop and avoid hitting it. We are unable to see the application of these rules to the instant case, in view of the rule announced in the cases relied upon by defendant."

A jury verdict for plaintiff was reversed. There was no evidence of primary negligence on the part of the defendant.

It is obvious under Oklahoma cases that petitioner's argument that a sign not in compliance with 66 O.S. § 124 constitutes evidence of negligence in occupied crossing cases is unfounded. If, as in *Templar, supra*, the signs cannot even be observed, or, as in *Fleming, supra*, the signs do not comply with statutory requirements and there is no duty to provide additional warnings, where a vehicle strikes the side of a train occupying the crossing, it does not matter that the alleged condition of the sign was not in compliance with State statute. The Oklahoma Supreme Court has so held. In such cases the train itself is sufficient warning as a matter of law.

Other Oklahoma cases applying the rule of law applicable reject petitioner's contention, as a matter of law, that failure to provide additional warning signs at the crossing is evidence of primary negligence in cases of this type. *Holt* v. *Thompson, supra; Cain* v. *St. Louis-San Francisco Railroad Co., supra; Lowden* v. *Bowles, supra; Kansas, Oklahoma & Gulf Ry. Co.* v. *Painter, supra.*

Petitioner further contends that the flat car upon the crossing was so obscure that reasonable men would differ as to whether or not it constituted a suitable warning to decedent. In *Kurn* v. *Jones, supra,* the Oklahoma Supreme Court held that the law makes no distinction between flat cars and box cars in regard to the legal right of a railroad company to block a crossing in the operation of its business. Numerous Oklahoma Supreme Court decisions have dealt with the type, color, and condition of the railroad cars involved, and in each case the Oklahoma Supreme Court held that there was no evidence of primary negligence on the part of the defendant railroad where the train had occupied the crossing prior to the impact. *Cain* v. *St. Louis-San Francisco Railroad Co., supra; Thompson* v. *Carter, supra; Fleming* v. *Loch, supra; Raley* v. *Thompson, supra; Kansas, Oklahoma & Gulf Ry. Co.* v. *Painter, supra.*

The Oklahoma cases hold, as the Tenth Circuit Court of Appeals in affirming the trial court's action sustaining the Motion for Summary Judgment, that each allegation of negligence on the part of this defendant has been rejected as a matter of law by the Oklahoma Supreme Court as sufficient evidence to establish primary negligence in this case. The cases most similar, factually, to the varying claims of negligence made by plaintiff in the case at bar are: *Kurn* v. *Jones, supra; Lowden* v. *Bowles, supra; Holt* v. *Thompson, supra; Thompson* v. *Carter, supra; Fleming* v. *Loch, supra; Raley* v. *Thompson, supra; Cain* v. *St. Louis-S. F. Railroad Co., supra;* and *Kansas, O. & G. Ry. Co.* v. *Painter.*

In all of the above cases plaintiffs made the same or varying claims of negligence that the petitioner made in the trial court. For the sake of brevity we do not treat each

allegation and combination of allegations of negligence in the cases separately. In each of the cases above cited numerous allegations of negligence were made and combinations of factual patterns similar to, and identical in some respects to the one made by petitioner in the trial court. In each of the cases the Oklahoma Supreme Court rejected the combination of alleged acts as evidence of primary negligence. The Tenth Circuit Court of Appeals recognized this in its opinion. The Tenth Circuit Court of Appeals, in affirming the Motion for Summary Judgment, properly followed Oklahoma law as it was bound to do.

C. Response to Petitioner's Question No. 3 (Petitioner's brief, pp. 3 and 4): "Whether the granting of summary judgment under the pleadings, facts and circumstances in this case deprive the plaintiff of her right to an action for damages for injuries resulting in death is guaranteed under Article 23, Oklahoma Constitution, Sec. 7, as amended in 1950, and whether said summary judgment wrongfully deprives plaintiff an action for injury occasioned by want of ordinary care of the defendant as provided in Title 76, O.S. § 5 (1970); all in violation of plaintiff's rights under the Constitution and statutes of the State of Oklahoma."

These questions are raised by petitioner for the first time in this appeal. Petitioner's contention that Article 23, Sec. 7 of the Oklahoma Constitution has been violated is unfounded. What petitioner claims is that her right of action for the wrongful death of her husband has been abrogated. A "right of action" and a "cause of action" are not one and the same. A "right of action" under Article 23, Sec. 7 of the Oklahoma Constitution is the right to pursue a remedy in the courts, whether the pursuit of that remedy is suc-

cessful or not. *Roberts* v. *Merrill*, 386 P.2d 780 (Okla. 1963). Petitioner has had her right of action in the courts. It has been pursued. However, the Oklahoma Supreme Court has held under these facts that no evidence of primary negligence has been established and that petitioner does not have a right of recovery.

Petitioner's claim that Title 76 O.S. § 5 has been violated by the granting of a summary judgment in this case is unsupported by any citation of authority. The question is raised for the first time on this appeal. In this regard, petitioner argues, in effect, that this case should go to a jury for determination of negligence regardless of the application of the law to the facts. If petitioner's contention is taken as true, then in every instance a case filed in the Oklahoma courts would be submitted to a jury without regard to the evidence in the case. There would be no need for a demurrer to the evidence or a directed verdict, or perhaps even for an appeal, if petitioner's argument is taken as true. The statute does not establish negligence in all cases. Negligence is established only by want of the exercise of ordinary care. *Stills* v. *Mayor*, 438 P.2d 477 (Okla. 1968). Under the facts of this case the Oklahoma Court has held, as a matter of law, ordinary care has been exercised.

D. Response to Petitioner's Question No. 4 (Petitioner's brief, p. 4): "Whether the granting of summary judgment under the pleadings, facts and circumstances in this case constitutes the creation of a special class of defendants who are afforded preferential treatment in regard to liability for tortious acts."

Petitioner contends that the application of the Oklahoma statute requiring vehicles to be driven in a manner

to stop within the assured clear distance ahead (47 O.S. §11-801(a) (1971) creates a special class of defendants and affords preferential treatment to them under the application of these statutes. It is unquestioned that the railway company was in the exercise of its legal rights in blocking the railroad crossing in the operation of its trains. The petitioner's decedent had no legal right to assume that the railroad track was clear. The application of the assured clear distance ahead statute in Oklahoma is not, under the decisions of the Oklahoma Supreme Court, so absolute as petitioner would lead this Court to believe. That statute is considered as a circumstance in a state of facts to determine the degree of caution and care on the part of the railroad. The statute is likewise considered in the same manner in numerous other cases insofar as the duties of motorists driving vehicles on the highway is concerned under the statute. In applying the statute to railroad cases, the Court in *Kurn* v. *Jones, supra,* page 244, recognized the application of the same statute in the same manner to motorists traveling on the highway. See also, *Oklahoma City-Ada-Atoka Ry. Co.* v. *Nickels, supra,* p. 1099; *Atchison, T. & S. F. Ry. Co.* v. *Templar, supra,* p. 911; *Smith* v. *Clark,* 256 Pac. 36 (Okla. 1927).

In her brief petitioner attempts to show that the presence of a railroad car on a crossing as being notice should not be applied to all types of railroad cars. In Oklahoma the law makes no distinction between box cars and flat cars. *Kurn* v. *Jones, supra.* If petitioner's contention was taken as true, and the type of cars passing over or occupying a crossing were to be taken into consideration in each instance, there would be no train which could be arranged

to relieve trainmen of warning the public at the crossing in all instances. It is apparent that the law makes no distinction between the type of cars involved. Further, a similar contention dealing with geographical configurations of crossings as being a circumstance which the trainmen were required to take into consideration has been rejected by the Oklahoma Supreme Court. Otherwise, there would be no railroad crossing which could be arranged in a manner that would relieve the trainmen of warning the public at all crossings at all times. Oklahoma has specifically rejected any such duty. *Lowden* v. *Bowles, supra.*

E. Response to Petitioner's Question No. 5 (Petitioner's brief, p. 4): For the sake of brevity petitioner's Question No. 5 will not be set forth herein. In essence, the question asked is does the statute, Title 47, O.S. §11-201(a) (1971), requiring a vehicle to be driven within the assured clear distance ahead, constitute an absolute defense to an allegation of negligence against a railroad company as a matter of law? Further, does this apply where the facts show the vehicle in question was traveling at a speed within the statutory limit and no facts indicate the speed was other than reasonable under the prevailing conditions?

The basic question asked has been dealt with herein in respondent's response to Question No. 2 of petitioner. It is apparent under Oklahoma law that the statute is not an absolute defense to the allegations of negligence against a railroad company. The statute is merely to be considered in the circumstances to determine the duties imposed upon the railroad company in such cases. *Kurn* v. *Jones, supra.* In each of the cases in Oklahoma dealing with the law of occupied crossings, which cases have been previously cited

in this brief, the Oklahoma Supreme Court has considered the above statute insofar as any additional duty on the railroad company to warn vehicles approaching the crossing is concerned. Under Oklahoma law the presence of the train is ordinarily notice in and of itself, absent unusual circumstances. As the Tenth Circuit Court of Appeals noted in its opinion, all of the allegations of negligence made by the petitioner in the trial court were specifically rejected by the Oklahoma Supreme Court as sufficient to establish any primary negligence on the part of the railroad in this case. As previously discussed, the acts of negligence alleged by petitioner in the trial court, and the various combinations of acts of negligence have been rejected singly and accumulatively as sufficient to establish primary negligence in this case. The decisions of the Oklahoma Supreme Court do not make the statute an absolute defense to an action against a railroad company in occupied crossing cases. At no place and at no time, in any of the decisions of the Oklahoma Supreme Court dealing with the duties imposed upon the railroad in its cases, has any such assertion been made by the Court.

F. Response to Petitioner's Question No. 6 (Petitioner's brief, p. 4): "Whether the question of decedent's contributory negligence, if any, under 47 O.S. § 11-801(a) (1971) *supra,* is a matter of law or question to be determined by the trier of fact considering all of the circumstances of the case."

Petitioner asserts at page 31 of her brief that respondent successfully prevailed on the United States District Court for the Western District of Oklahoma and the Tenth Circuit Court of Appeals to announce plaintiff's decedent

contributorily negligent as a matter of law under the above statute. (Note: The statute discussed in petitioner's brief is the present legislative re-enactment of the statute discussed in the cases previously cited in this brief, applying the rule of law in occupied crossing cases.)

An examination of the opinions of the Oklahoma Supreme Court in the occupied crossing cases, which rule of law was applied by the Tenth Circuit Court of Appeals in this case, does not involve the issue of contributory negligence as a matter of law. Each case is decided on the sufficiency of the evidence to make a case of primary negligence on the part of the railroad, which should be submitted to a jury. In each of the cases, the Oklahoma Supreme Court held that the evidence was insufficient in that regard. At no time, either in the trial court or in the Tenth Circuit Court of Appeals did respondent claim petitioner's decedent was contributorily negligent as a matter of law. In fact, the only time this claim has been made is by petitioner in the petition and brief on appeal to this Court. It is apparent under the cases previously cited there is no evidence of primary negligence as a matter of law. In its opinion, the Tenth Circuit Court of Appeals recognized and applied the standards set forth in the decisions of the Oklahoma Supreme Court in this case.

Under the above question presented by petitioner the case of *Gross* v. *Southern Ry. Co.*, 414 F.2d 292 (C.A. 5th 1969), and *Missouri-Kansas-Texas R. Co.* v. *McFerrin*, 291 S.W.2d 931 (Tex.Civ.App. 1956), cited in this regard, deal with the issue of contributory negligence on the part of the plaintiffs. The cases do not involve, nor is the rule as applied by the Oklahoma courts in cases of this nature discussed

in the opinions. The cases are inapplicable as they do not involve the same factual pattern, application of Oklahoma law, nor do the cases involve the same or similar duties imposed upon the railroad company under Oklahoma law.

Petitioner says that it is more hazardous for the respondent to operate its trains within the Fifth Circuit jurisdiction than within the Tenth Circuit jurisdiction under the *Gross* case. It is respectfully submitted that the Fifth Circuit determination of Georgia law is not, and cannot be compared to a decision of the Tenth Circuit Court of Appeals following Oklahoma law. In this regard, petitioner seems to imply that the Oklahoma rule as applied by the Tenth Circuit Court of Appeals in this case would be applied throughout the Tenth Circuit. Such comparison is unfounded. If the Tenth Circuit Court of Appeals had the same facts under the laws of Kansas or New Mexico, or some other state, where the state law differed the Circuit Court would follow the state law as the Tenth Circuit was required to do; its decisions would not be the same in every case.

Petitioner's entire proposition fails to deal with the real issue involved in this case. The issue is, under the evidence presented, was there any evidence of primary negligence on the part of respondent under applicable Oklahoma law? It is unquestioned under the decisions of the Oklahoma Supreme Court that the evidence was not sufficient in this regard. Obviously, had the evidence been sufficient to establish primary negligence on the part of respondent, and the evidence warranted, the issue of contributory negligence would have been submitted to a jury. However, petitioner's assertion that the petitioner's decedent was found guilty of

contributory negligence as a matter of law is unsupported by anything in the record or in the decisions of the lower courts in this matter.

G. Response to Petitioner's Question No. 7 (Petitioner's brief, p. 5): "Whether the trial court and the Tenth Circuit Court of Appeals by their ruling in regard to 47 O.S. § 11-801(a) (1971) found *ipso facto* that said statute was violated, thereby depriving the plaintiff of trial by jury as to the issue of contributory negligence."

Petitioner's Proposition No. 7 concerns the same legal issue presented in the preceding proposition. It has been demonstrated throughout the brief and by the decisions of the Tenth Circuit Court of Appeals that the question was not one of contributory negligence of petitioner's decedent as a matter of law. Rather, the question is the sufficiency of the evidence to establish any primary negligence on the part of respondent. Petitioner's assertion that the issue of contributory negligence on the part of petitioner's decedent was involved in this case is unfounded. Certainly, had the case gone to the jury the question of a violation of 47 O.S. § 11-801(a) (1971) would have been, or should have been submitted to a jury to determine the contributory negligence, if any, of petitioner's decedent.

However, the statute has been considered by the Oklahoma Supreme Court in the decisions followed by the Tenth Circuit in its opinion only as it applies to the question of primary negligence on the part of a railroad in such cases. It is not the only factor considered. It is not absolutely determinative, but gives rise to a set of circumstances from which there may be a duty on the part of the railroad to

provide additional warnings. *Oklahoma City-Ada-Atoka Ry. Co.* v. *Nickels, supra,* 1098-1099; *Kurn* v. *Jones, supra,* 244. It is apparent from the opinion of the Tenth Circuit Court of Appeals affirming the decision of the trial court in this case that the statute was not applied to the issue of contributory negligence. The Oklahoma cases were followed, and as the Oklahoma courts have held under these circumstances and under the facts presented there is no evidence of primary negligence on the part of the railway company. The railway company was entitled to a judgment as a matter of law.

H. Response to Petitioner's Question No. 8 (Petitioner's brief, p. 5): "Whether the Oklahoma Supreme Court by means of judicial legislation has granted to a special interest group, exclusive of all other groups and citizens, and to the prejudice of this plaintiff, a favored status in regard to the laws of negligence of this state without the benefit of constitutional or statutory authority."

Petitioner contends that the case of *Peagler* v. *Atlantic Coast Lines R. Co.,* 107 S.E.2d 15 (S.C. 1959), should be compared to the case before this Court. The *Peagler* case was decided under the laws of South Carolina and not under the laws of the State of Oklahoma. The facts in *Peagler* are strikingly similar to those of *Kurn* v. *Jones, supra,* wherein the Oklahoma Supreme Court under similar facts reversed a judgment in favor of the plaintiff against the railroad. The Oklahoma Supreme Court held there was no evidence of primary negligence to create a jury case. The decision in *Peagler* involved a claim that headlights from the automobile on the opposite side of the track created an illusion; that such illusion misled the plaintiff and contributed to

his striking the flat car upon the railroad crossing. There is no evidence in the case before this Court that any such illusion was created by headlights on the opposite side of the track. In any event, Oklahoma has held, as a matter of law, that such facts do not create any unusual conditions which give rise to providing additional warnings at the crossing. *Lowden* v. *Bowles, supra,* p. 1063. In this regard, petitioner makes the assertion in its eighth question presented for review for the first time in this appeal.

It is apparent under the common law and statutory provisions of the State of Oklahoma that all railroad corporations and all travelers on the highway are treated equally with regard to cases involving this factual pattern. The Court has held that absent unusual circumstances there is no evidence of primary negligence on the part of the railway company where the railroad train has occupied the crossing prior to the collision. The train itself is notice—as a matter of law. If unusual circumstances exist, then a jury issue as to the negligence of the railway company is created. Under the facts in this case, the Oklahoma Supreme Court has rejected all allegations of negligence made by the petitioner in the trial court as constituting evidence of primary negligence.

Petitioner's assertion that the railroads are treated differently in Oklahoma than any other class of citizens is an unfair comparison, and obviously unfounded. Petitioner contends that since she was unable to prove any evidence of primary negligence she should be entitled to a jury determination of negligence on the part of the respondent, even though other citizens are not so entitled. Different duties are imposed upon different persons, depending upon cir-

cumstances involved. Petitioner would seem to say that every case, regardless of the sufficiency of the evidence, should be submitted to a jury. Would petitioner contend that a trespasser was owed the same duty as a business invitee, under Oklahoma law? That is not the case, and further, any such comparison is unfair and unfounded. Different duties are imposed upon different persons depending upon the nature of the activity, statutory provisions and common law.

The substantive law of Oklahoma was followed by the United States District Court for the Western District of Oklahoma and the Tenth Circuit Court of Appeals. There is no federal common law. The federal courts are not concerned with the declaration of state law, either by the Legislature or by its highest court. Such is a question for the state courts. *Erie R.R. Co.* v. *Tompkins*, 58 S.Ct. 817, 304 U.S. 64, 82 L.Ed. 1188 (1938).

Under Oklahoma law the evidence in this case, viewed most favorably for petitioner, does not create a jury issue of negligence. Respondent was entitled to a judgment as a matter of law.

SUMMARY

The substantive rule of law applicable to the facts in the case before this Court provides that ordinarily the presence of a railroad train or cars upon a crossing is sufficient notice to a motorist that the crossing is obstructed and, absent unusual circumstances, the railroad is not under any duty to provide additional notice or warnings. *Oklahoma City-Ada-Atoka Railway Co.* v. *Nickels, supra* (and

cases therein cited). A partial basis for this rule of law is that by statute in Oklahoma operators of motor vehicles on the highway are required to operate the vehicles in a manner which will allow them to stop within the assured clear distance ahead. The statutory provision is considered and applied to the facts in each case as to the question of primary negligence, if any, on the part of the railroad. *Kurn* v. *Jones, supra.*

The action before this Court is a diversity action and the substantive law of Oklahoma is applicable. The Supreme Court of Oklahoma has not changed the rule of law applied to occupied crossing cases. In fact, the Court has recognized that while it is unfortunate that burdens may fall upon people in such cases, it is impossible to pronounce rules of law which would change the results in such cases. *Cain* v. *St. Louis-San Francisco Railroad Co., supra.*

Petitioner, in effect, asks this Court to review the evidence in the case. On appeal to the Tenth Circuit Court of Appeals the only questions posed by petitioner were the sufficiency of the complaint to state a claim for relief, and whether, under the evidence, summary judgment was proper. All other questions presented are raised by petitioner for the first time in this appeal. Nevertheless, it is respectfully submitted that said questions in no way make the decisions of the lower courts in this case improper.

The evidence has been considered, together with the Oklahoma case law. Petitioner does not contend that all the evidence was not before the trial court prior to the ruling on respondent's motion for summary judgment. Neither does petitioner contend that the crossing was not occupied

by the train prior to the accident. All discovery was completed. The United States District Court for the Western District of Oklahoma and the Tenth Circuit Court of Appeals have both reviewed the evidence and considered the effect of the Oklahoma Supreme Court decisions. Both courts found, under the evidence and applicable law, that no unusual conditions existed to require respondent to provide any additional warnings of the presence of the train on the crossing. The train itself was sufficient notice as a matter of law. There was no evidence of primary negligence on the part of respondent as a matter of law. Respondent was entitled to a judgment as a matter of law.

Throughout her brief, petitioner asserts that respondent contended, and the lower courts held that petitioner's decedent was contributorily negligent as a matter of law. Such statement is without merit. No such claim was ever made by respondent in the motion for summary judgment or in the briefs on appeal. The lower courts did not make any such holding. Following Oklahoma substantive law, the courts found respondent was entitled to a judgment as a matter of law. There was no inference from the evidence of any negligence on the part of the railway company under applicable Oklahoma law.

In effect, petitioner asks this Court to review the evidence in this case and change the rule of law announced by the Oklahoma Supreme Court as being applicable in such cases. The Oklahoma Supreme Court, as clearly demonstrated by *Oklahoma City-Ada-Atoka Ry. Co.* v. *Nickels, supra* (and cases cited therein), has considered the effect of darkness at the crossing; type, color and condition of railway cars involved; lack of visible warning signs; ab-

sence of flagmen; varying geographical configurations; and the effect of lights at or around the crossing. In each case, considering various combinations of the above conditions, together with other conditions and claims of negligence made by plaintiffs, the Oklahoma Supreme Court has found no evidence of primary negligence where a railroad train had occupied the crossing prior to impact. The Supreme Court of Oklahoma has rejected, as a matter of law, all facts, evidence and allegations of negligence made by petitioner in this case as sufficient to create any jury issue of primary negligence on the part of respondent. If all the facts in this case were to be submitted to a jury it would be the duty of the trial court to direct a verdict for the respondent, in view of the substantive laws of Oklahoma.

Both the United States District Court for the Western District of Oklahoma and the Tenth Circuit Court of Appeals have reviewed the evidence and properly followed and applied Oklahoma substantive law. Under the circumstances, no special reason exists for granting the writ of certiorari. The review would be of no importance or significance to any other case from a factual standpoint. Further, any such review would only delve into and weigh the evidence and question the substantive laws of the State of Oklahoma.

CONCLUSION

The evidence in this case has been reviewed by two federal courts, which courts are familiar with and apply Oklahoma law in the daily course of their activities. Each court found that petitioner failed to establish any evidence from which an inference of primary negligence on the part

of respondent could be made. Respondent was entitled to, and properly given, summary judgment in this case. Respondent was entitled to a judgment as a matter of law.

It is respectfully submitted that the writ of certiorari prayed for by petitioner be denied.

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July, 1975

CERTIFICATE OF SERVICE

Service of the foregoing Response to Petition for Writ of Certiorari has been made this ..... day of July, 1975, by mailing three copies hereof to Hiram Keith Myers, Jr., of the firm of Myers & Cummins, 125 N. 2nd Street, Hollis, Oklahoma 73550.

.....

Counsel for Respondent